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Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT L. VERA CRUZ,
Petitioner,

vs.

CITY OF ESCONDIDO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court below erred by holding that the use of a police dog to "seize" a misdemeanor suspect by inflicting life-threatening bite wounds causing permanent injuries was not "deadly force" under *Tennessee v. Garner* because it was not force "reasonably likely to kill," notwithstanding the fact that the Model Penal Code's definition of "deadly force" as force creating "a substantial risk of causing death or serious bodily harm" urged by petitioner has been accepted by every other circuit court to consider this issue and by law enforcement agencies across the country as the proper definition of "deadly force."

PARTIES TO THE PROCEEDINGS

Petitioner Robert L. Vera Cruz was the plaintiff in the district court and appellant in the Court of Appeals for the Ninth Circuit. Before the district court, defendants were respondent City of Escondido and three of its police officers, Police Chief Vincent Jimno, Sergeant Corey Moles, and police dog handler Eric Distel. The individual defendants were later dismissed on stipulation or pursuant to qualified immunity. Respondent City of Escondido was the only appellee before the Court of Appeals for the Ninth Circuit and is the only respondent in this Court.

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Petitioner Robert L. Vera Cruz respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The final opinion of the Court of Appeals for the Ninth Circuit, as amended, is reported at 139 F.3d 659 and is reprinted in the Appendix to this petition at 1a. ("Pet. App.") The original opinion of the Court of Appeals for the Ninth Circuit is reported at 126 F.3d 1214, and is reprinted in the Appendix at 17a. The Order amending the original opinion and denying the petition for rehearing and suggestion for rehearing *en banc* is reprinted in the Appendix at 12a. The judgment on the special verdict in the district court is unreported and is reprinted in the Appendix at 25a.

JURISDICTION

The Ninth Circuit issued its initial opinion on October 3, 1997. A timely petition for rehearing and suggestion for rehearing *en banc* was filed by petitioner. The Ninth Circuit issued its amended opinion on March 31, 1998. By order dated March 31, 1998, petitioner's petition for rehearing and rehearing *en banc* was denied. Pet. App. 12a. The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND PENAL CODE PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Model Penal Code ("MPC"), at Section 3.11(2) (1985), defines deadly force as:

> force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force.

STATEMENT OF THE CASE

At issue in this case is whether the police may constitutionally deploy a dog to bite a misdemeanor suspect in order to "seize" the suspect in the absence of probable cause to believe that the suspect poses a threat of serious injury to the police or others, where such dogs are trained to bite suspects in a manner that is substantially likely to cause intense pain and serious bodily injury, but where such bites are not necessarily "reasonably likely" to kill (assuming adequate and prompt medical treatment). The Ninth Circuit authorized the use of such dog bites to "seize" suspects in such circumstances, notwithstanding the substantial risks of serious bodily harm so graphically illustrated by the facts of this case.

1. This case involves the mauling of petitioner by a police dog unleashed against petitioner by City of Escondido officers on January 1, 1992. Petitioner was, at most, a misdemeanor suspect when the Escondido police deployed a dog to "seize" him. Petitioner received life threatening and permanent injuries as a result of the dog bites he received. He was never charged with any criminal offense arising out of this incident.

Before his encounter with the Escondido police, petitioner had been involved in an argument with employees at a Del Taco restaurant after being refused food. RT 506-507. A 10:24 p.m. radio dispatch reported a white male was trying to kick in the doors of a Del Taco restaurant. ER 216, 254. Two police units were dispatched to respond to this call. Officer Distel, an Escondido police dog handler, arrived first with his dog and located petitioner standing outside the open rear door of Del Taco under an overhead light. ER 254. According to Distel, petitioner appeared to be intoxicated. While the dog handler saw that

Vera Cruz had strapped on his hip a knife in a sheath, the dog handler conceded that Vera Cruz carried the knife lawfully and had not threatened anyone with it.

According to the officers on the scene, petitioner turned and walked away from Officer Distel, who was approximately fifty feet away from petitioner at the time, and began running once the officer removed the dog from his patrol car and threatened to release the dog. ER 254-255. At this point, Officer Distel released the dog and it chased petitioner and then administered the bites which nearly severed petitioner's arm. ER 255. The dog bit petitioner's arm, causing a five-inch long tear, cutting his biceps in two and partially severing his triceps. RT 225-226.

Petitioner was handcuffed and taken into custody and transported to Palomar Medical Center where he was treated for his wounds. Petitioner endured major surgery and was hospitalized for eight days. RT 477. He was unable work for nine months. RT 486. Even the City conceded that petitioner's "pain and suffering were obviously intense . . ." RT 205-206.

Although the evidence regarding the incident was disputed in some respects at trial, a reasonable jury would have had ample evidence to conclude that no reasonable police officer would have believed that petitioner posed any threat of death or serious bodily injury to the officers or others in these circumstances. Rather, the officers involved admitted that Vera Cruz posed no threat of death or serious bodily injury to them or others.

2. Escondido uses its dogs as weapons to "seize" persons by attacking and biting. Both sides' experts testified at trial that the dogs were trained to bite any part

of the body they can reach, and to bite has hard as they can, with a full mouth, for as long as the dog can. RT 385-386. Thus, the dog's teeth "frequently penetrate deeply." RT 316-317. It was not unusual for bones to be broken, RT 317, or for infections to develop. RT 314-315.

Professor James Fyfe, one of the experts relied upon in *Tennessee v. Garner*, 471 U.S. 1, 12 n.10 (1985), and a nationally prominent expert on police use of force, testified as an expert witness at trial for petitioner on the issue of the nature of the risks associated with the use of police dogs. He testified about a study he performed in which 37% of all police canine bite victims required in-patient hospitalization. This study showed that a police dog attack like the one on petitioner was likely to cause serious injuries and that petitioner's injuries were neither freakish nor aberrational.

3. Petitioner's theory of the case at trial was that by deploying a large dog trained to bite suspects in a manner highly likely to cause intense pain and serious injury, the officers had employed "deadly force" on him in violation of the restrictions on police use of such force enunciated in *Tennessee v. Garner*.

Petitioner contended that the use of police dogs against suspects in petitioner's position, especially given the way the City of Escondido's dogs were trained and deployed, created a substantial risk of death or serious injury within even the Escondido police department's definition of "deadly force" -- that force "which may result in serious injury or death." This is, and was at the time petitioner was attacked, the generally accepted definition of "deadly force" used by law enforcement agencies throughout the country. It is also the definition used by the Model Penal Code and the definition used in every

published decision that has considered this issue prior to the Ninth Circuit's decision here.

Petitioner sought jury instructions reflecting this theory of the case.[1] The district court rejected petitioner's request for a deadly force instruction under *Tennessee v. Garner*. RT 1041, AER 195. The jury instruction sought by petitioner would have informed the jury that "[a] police officer may use force which creates a substantial risk of causing serious bodily injury only when the police officer has probable cause that the subject poses a significant immediate threat of death or serious physical injury to the officers or others." ER 208. Other related jury instructions further defined the terms "serious bodily injury," ER 209-210, and "deadly force," ER 211.

The requested jury instruction defining "serious bodily injury" provided as follows:

> JURY INSTRUCTION NO. 60
> (Serious Bodily Injury -- Defined)
>
> "Serious bodily injury" refers to significant or substantial bodily injury or damage; it does not refer to trivial or insignificant injury or moderate harm. Serious bodily injury means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound

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[1] Petitioner also moved for a new trial on this basis. ER 261. This motion was denied. ER 264.

requiring extensive suturing; and serious disfigurement. Injury which causes significant pain and requires considerable time to heal can be serious bodily injury. Multiple abrasions or lacerations or contusions can be serious bodily injury. Reasonable possibility of serious infection is serious bodily injury.

An instrumentality inflicting serious bodily injury is not limited to a gun or a knife. For example, striking with the hand or fist, kicking, choking, biting, or other comparable means may constitute force reasonably capable of causing serious bodily injury.

To establish that the force used was reasonably capable of causing serious bodily injury, it is not necessary to show that serious bodily injury was actually inflicted. It is only necessary to show that the force used was reasonably capable of causing serious bodily injury.

In determining whether an injury constitutes serious bodily injury as that term is defined herein, it is irrelevant that medical treatment will alleviate or prevent permanent disability caused by the injury.

The requested jury instruction on "deadly force" provided as follows:

JURY INSTRUCTION NO. 63
(Deadly Force -- Defined)

"Deadly force" means that force which creates a substantial risk of causing death or serious bodily harm.

The jury, deliberating without a "deadly force" instruction, found that Officer Distel, the dog's handler, did not use excessive force. Because the district court had found that the use of the dog on petitioner was not "deadly force" as a matter of law, the jury was not permitted to reach the issue whether the City of Escondido was responsible for petitioner's injuries because the city maintained a policy allowing the use of the dog in these circumstances to inflict these kinds of injuries. This was the basis for petitioner's appeal in the Ninth Circuit against the City of Escondido.

4. The Ninth Circuit rejected petitioner's argument that "deadly force" should be defined as it has been in the MPC and in police department policies across the country and held that deadly force under *Tennessee v. Garner* means, "force reasonably likely to kill." Pet. App. 3a. The Ninth Circuit recognized that other circuits "do seem to have adopted the MPC's definition of deadly force . . ." Pet. App. 8a. However, the court suggested that all of these other courts did so in the context of records different from the record presented in this case. *Id.*

The Ninth Circuit found that the MPC's definition was "inapposite" to Fourth Amendment concerns in that the MPC was designed to serve different purposes. Pet. App. 7a. In particular, the Ninth Circuit expressed a reluctance to equate police officers with criminals to which the MPC's

definition of "deadly force" is applied in other contexts. The Ninth Circuit further reasoned that the MPC's consideration of subjective intent was at odds with the objective analysis required under *Graham v. Connor*, 490 U.S. 386, 397 (1989). Pet. App. 7a.

The Ninth Circuit suggested that all of the courts which had adopted the MPC's definition, and presumably all of the law enforcement agencies across the country which have done the same, did so for lack of a better definition, Pet. App. 8a, as opposed to the recognition that the MPC definition reflects the balancing of the competing relevant interests that most faithfully implements the commands of the Fourth Amendment.

The Ninth Circuit believed that this Court's reasoning in *Tennessee v. Garner* would have been different if the force used by the police there would only cause serious bodily injury rather than death. Pet. App. 9a. The court seemed to believe that defining "deadly force" under *Garner* in a way that included a substantial risk of "serious bodily injury" would subject almost any use of force to the *Garner* standard. Pet. App. 10a.

In light of the undisputed evidence that the use of a police dog was not "reasonably likely to kill" a suspect the Ninth Circuit affirmed the judgment below.

REASONS FOR GRANTING THE WRIT

In *Tennessee v. Garner*, this Court placed limits on the police use of "deadly force" holding that such force could be constitutionally employed only to "seize" felons who the officer had probable cause to believe presented a significant threat of death or serious injury to the officer or

others. 471 U.S. at 3. This Court did not define "deadly force" in *Tennessee v. Garner* because it had no need to. The force used in that case, a gunshot, was obviously deadly force.

While the facts in *Garner* concerned a shooting death, until *Vera Cruz, Garner* has never been read as being limited to weapons "reasonably likely to kill." To the contrary, police agencies and the decisional law treated *Garner* as applying to any use of deadly force as defined by the Model Penal Code or its equivalent. Thus, until *Vera Cruz*, there was a national consensus that deadly force was not limited to force likely to kill but included force substantially likely to cause "serious bodily injury." The Ninth Circuit's new formulation has no apparent roots in any decision of this Court, or any other court, and is significantly narrower than the definition of "deadly force" actually employed by law enforcement agencies across the country.

This case arises under the "serious bodily injury" prong of the MPC definition of "deadly force" and it is this prong the court below found inapplicable to the Fourth Amendment's limitations on the use of force. Under the Ninth Circuit's view, the fact that a reasonable police officer would know that the use of a police dog was likely to cause "serious bodily injury," including the gruesome injuries suffered by the petitioner here, does not call for any special Fourth Amendment limitation on the use of such force. Thus, as here, such force may be used against a fleeing misdemeanor suspect who poses no threat to the officer or others.

Under the Ninth Circuit's ruling, *Garner* is newly limited to that small category of police weapons reasonably likely to actually kill a fleeing suspect -- flesh-tearing dog

bites, capable of rendering life-long disability, are now subject in the Ninth Circuit's view only to the generic standard of *Graham v. Connor*. Under the Ninth Circuit's decision, misdemeanant or felon, armed or not, a suspect may be permanently disfigured so long as it is objectively necessary to bring him or her under the officer's control, whether or not the suspect poses any threat to the safety of the officer or others. The Ninth Circuit's decision reads *Tennessee v. Garner* much too narrowly and threatens to destabilize the national consensus on the definition of "deadly force" in a way that threatens community safety, rather than enhances it.

The circuit courts are now split on that issue of urgent national importance. The intervention of this Court would establish clear national standards, either the standards already widely accepted by the courts and law enforcement agencies and urged in this case by petitioner, or the newly minted standard adopted by the Ninth Circuit.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS, ALL OF WHICH HAVE ADOPTED THE MODEL PENAL CODE'S DEFINITION IN DEFINING DEADLY FORCE FOR FOURTH AMENDMENT PURPOSES.

The Ninth Circuit's decision is the *only* decision below to reject the MPC formulation on the limits on the use of deadly force, a definition accepted by the City of Escondido, law enforcement agencies across the country and all of the courts that have previously considered this issue. Thus, the decision below has great potential to destabilize the settled national understanding of the

limitations on police use of deadly force widely accepted by law enforcement agencies and in existing Fourth Amendment jurisprudence after this Court's decision in *Tennessee v. Garner*. Indeed, respondent's counsel on appeal was quoted as saying: "I am going to put the word out on the Internet when I go home. I am going to recommend to all my clients that they *change* their definition of deadly force." Los Angeles Daily Journal, Oct. 6, 1997, at 3 (emphasis added).[2]

In determining what forms of police use of force must satisfy the requirements for the use of "deadly force" under the *Tennessee v. Garner* standard, courts have employed the Model Penal Code's definition of force that a police officer would know "creates a substantial risk of causing death or serious bodily harm." This standard, especially in the context of an ordinary misdemeanor arrest such as occurred here, is designed to avoid the grossly disproportionate use of force that led to petitioner's debilitating injuries in circumstances where less dangerous measures are clearly warranted. The Ninth Circuit's new standard, especially in the context of the use of police canines, authorizes the use of a weapon that is capable of imposing horrific injuries on members of the community in

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[2] Underscoring the critical need for clarity in this area is the position of police dog organizations themselves, which promote the professional use of canines in law enforcement. These groups have noted the importance, in their educational materials, of the decision below on the use of force. (Oregon Police Canine Association, <http://www.opca-.wom/veracruz.html>; K9 Tactics, http://www.-k9tactics.com/index.html; K9 Academy For Law Enforcement Case Law Center, <http://www.best.com/~policek9/-caseindx.htm>; United States Police Canine Association, <http://www. minn.net/uspca/ patrolcaselaw.htm>).

circumstances where such injuries are clearly disproportionate to any legitimate law enforcement objective.

The Eleventh Circuit in *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985), rejected the definition later advanced by the Ninth Circuit in this case. In *Pruitt*, the defendant city argued its officer had not used deadly force even though he intentionally shot the suspect because the officer "had not tried to kill Pruitt but, rather, only shot to stop him by hitting his legs." 771 F.2d at 1479 n.10. The Eleventh Circuit held that the Model Penal Code deadly force definition, in particular, the prong concerning "serious physical injury," properly defined deadly force "in the constitutional sense." Consequently, that court held that the officer, by shooting at the suspect's legs, used deadly force because the shooting was "force capable of causing *serious bodily injury*." 771 F.2d at 1479-80, n.10 (emphasis added).

In *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), the Sixth Circuit adopted the MPC definition in a police dog bite case, as identifying the factors a court should consider in evaluating a use of force under *Tennessee v. Garner*. *Id.* at 912 (stating that the MPC definition of deadly force was a "useful statement of the two factors most relevant to the determination of whether the use of a particular law enforcement tool constitutes deadly force."). *See Mathews v. Jones*, 35 F.3d 1046, 1051 (6th Cir. 1994) (reaffirming validity of approach in *Robinette* and the use of the Model Penal Code definition of "deadly force").

The *Robinette* court drew no distinction between the risk of ensuing death and the risk of causing serious bodily

injury. The Sixth Circuit found, on the record in that case, that the use of a police dog to apprehend a felony suspect did not carry with it a "substantial risk of causing death or serious bodily harm," even though the suspect did die in *Robinette*.

The Third Circuit also affirmed the use of a "deadly force" instruction based upon the MPC definition and *Garner* in a § 1983 action involving a police dog attack in *Marley v. City of Allentown*, 774 F. Supp. 343 (E.D. Pa. 1991), *aff'd without opinion*, 961 F.2d 1567 (3d Cir. 1992), in the context of the "seizure" by biting of a fleeing misdemeanor suspect.

In *Ryder v. City of Topeka*, 814 F.2d 1412, 1416-1417 (10th Cir. 1987), the Tenth Circuit reaffirmed that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." The *Ryder* court emphasized that "deadly force does not occur only when the suspect actually dies," and noted that "[s]everal courts have adopted the Model Penal Code definition of deadly force." 814 F.2d at 1416 n.11.

In *Mathis v. Parks*, 741 F. Supp. 567 (E.D.N.C. 1990), the court found a fullforce blow to the abdomen using the knee was "deadly force" because such force may "cause serious bodily harm." 741 F. Supp. at 572 and n.3.

The Eighth Circuit employed the MPC formulation in *Mattis v. Schnarr*, 547 F.2d at 1007, 1009 n.2 (8th Cir. 1976) (*en banc*), *vacated as moot sub nom*; *Ashcroft v. Mattis*, 431 U.S. 171 (1977), describing "deadly force" as "such force as under normal circumstances poses a high risk of death or serious injury to its human target, regardless of

whether or not death, serious injury or any harm actually results in a given case." *Id.* at 1009.

Even the Ninth Circuit had previously supported the MPC definition of deadly force as the appropriate standard to determine whether an application of force by the police had to meet the *Tennessee v. Garner* standard. In *Fikes v. Cleghorn*, 47 F.3d 1011 (9th Cir. 1995) a different panel of the Ninth Circuit found that the prior decision in *Chew v. Gates*, 27 F.3d 1432, 1453 n.4, (9th Cir. 1994), "suggests that it ['deadly force'] might be defined as a 'force that creates a substantial risk of causing death or serious bodily harm.'" 47 F.3d at 1014.[3]

Although *Fikes* held that the dog that bit the plaintiff did not create a "substantial risk of causing death or serious bodily harm," 47 F.3d at 101, it used the MPC standard and not the "reasonably likely to kill" standard created by the court below to make the determination on deadly force. *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996) also found that use of a police dog did not meet the MPC standard for deadly force, while recognizing the importance of the standard in making this determination, 84 F.3d at 357.

Significantly, each of these cases employs the MPC definition, including force which is likely to cause "serious bodily injury" in the definition of "deadly force." None of these cases limited the concept of "deadly force" to force which is "reasonably likely to kill," as the Ninth Circuit did in this case.

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[3] In *Chew*, former Los Angeles Police Chief Daryl Gates gave deposition testimony that he was "'very much' aware that such bites could be fatal," 27 F.3d at 1441.

II. THE DECISION BELOW IS AT ODDS WITH THIS COURT'S DECISION IN *TENNESSEE v. GARNER* AND THREATENS THE STABILITY OF WELL-ESTABLISHED NATIONAL STANDARDS GOVERNING THE POLICE USE OF DEADLY FORCE.

The definition of "deadly force" under *Tennessee v. Garner* in the context of police uses of force other than shooting, is an issue of immediate national importance. The facts of this case graphically demonstrate the risk to life and limb posed by the Ninth Circuit's narrow view of "deadly force."

"There is general agreement [among police agencies] that the term [deadly force] means force reasonably capable of causing death or great bodily harm." W.Geller & M.Scott, "Deadly Force: What We Know," 23 (Police Executive Research Forum 1992) ("Deadly Force"). Indeed, this was the policy in the City of Escondido and generally in California at the time of this incident. *See, e.g., People v. Nealis*, 232 Cal.App.3d Supp 1, 283 Cal.Rptr. 376, 378 (1991). The International Association of Chiefs of Police ("IACP") in its Model Policy for the use of force, deadly and non-deadly, defines "deadly force" as "[a]ny use of force that is likely to cause death or *serious bodily harm.*" *Deadly Force, supra*, at 478 (emphasis added).

This Court stressed the relevance of actual department policies in defining the Fourth Amendment limits on the use of force. *Tennessee v. Garner*, 471 U.S. at 19-20. The Ninth Circuit's formulation --- "reasonably likely to kill" --- if accepted, would undermine the extensive national consensus on the definition of "deadly

force" and would inevitably result in an increase in the incidence of deaths and serious bodily injuries caused by the police in a wide range of police encounters with members of the community.

The Ninth Circuit justified its definition of "deadly force" by citing *Garner*'s statement on the "self-defeating" nature of using deadly force to set in motion the criminal justice system. 471 U.S. at 10. From this Court's statement, the Ninth Circuit interprets *Garner* as concerned only with force reasonably likely to cause death. However, this Court's reasoning in *Garner* supports using the MPC definition. Using force that is likely to cause serious bodily injury, although not as likely to cause death as a firearm, to seriously injure and permanently maim a non-dangerous fleeing misdemeanor suspect, amounts to punishment summarily imposed out of proportion to the crime which prompted police intervention. This case is a good example. Petitioner was never charged with any crime but he suffered permanent injuries as a result of the dog bites he received.

The facts of this case show graphically the grave and immediate risks to the public posed by narrowing the definition of "deadly force." Petitioner suffered extremely severe, life threatening and debilitating injuries because of the dog bites he received, while he was never charged with any crime and, indeed, was chargeable by the police in these circumstances with no greater crime than public drunkenness, if one takes the police reports at face value.

Medical testimony from petitioner's expert witness, Dr. Meade, demonstrates that police dog bites are a threat to human life, not only because of their great potential for infection but also because of the permanent and severe injuries they cause. ER 124.

One reason the Ninth Circuit rejected the applicability of the MPC's definition of "deadly force" is that the MPC is designed to govern criminal liability and police should not be governed by the same standards. Pet. App. 7a. The applicability of the MPC's definition, however, does not equate police with criminals, or suggest that police conduct is governed by the same standards in all circumstances. Moreover, the people against whom police dogs are deployed are not "criminals;" at most, they are persons the police suspect to have been involved in some criminal activity. In many cases, as was the case here, no criminal charges are ever filed against such persons. The standards governing the police use of force which has the likely capacity to cause the kind of permanent, disfiguring injuries petitioner suffered here cannot depend on the notion that all persons against whom the police deploy dogs are "criminals."

The use of the MPC definition by courts and law enforcement agencies is not based on equating the police and criminals; it is based on the understanding that the MPC definition best embodies a fundamental proportionality principle embedded in the Fourth Amendment. This principle is implicated when the police use of force is substantially likely to cause serious bodily harm, just as it is implicated by the police use of firearms which are more likely to kill.

The Ninth Circuit's concern that the MPC definition incorporated a subjective element at odds with the Court's decision in *Graham v. Connor* is misplaced. Petitioner's proposed jury instructions did not focus on the officers' subjective intent; the proposed instructions were fully consistent with the approach taken by this Court in both

Tennessee v. Garner and *Graham v. Connor*.[4]

The MPC definition has been found by the majority of courts that have considered this question to be the standard that most clearly articulates the fundamental proportionality principle this Court mandated in *Tennessee v. Garner*. *See, e.g., Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985) (Eleventh Circuit uses MPC definition and therefore holds that force likely only to cause serious injury is still "deadly force" in the constitutional sense" under *Garner*.). Any less restrictive standard will ineluctably lead to an increase in deaths and serious physical injuries inflicted by police officers in situations in which the use of such force is not justified.

The Ninth Circuit rejected the traditional definition because "almost any use of force is potentially deadly: A suspect may slip, fall and sustain a lethal head injury, even though the police used only moderate force; a small cut, if left untreated, might become infected and cause death." 139 F.3d at 661. Yet the MPC definition petitioner sought in his proposed jury instructions -- and as used by other courts -- forecloses this possibility. The force must present a *substantial* risk of death or serious injury. Petitioner's proposed instructions on "serious bodily injury" would not reach moderate use of force which results in unforeseeable or aberrational injuries.

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[4] The MPC definition defines "deadly force" by reference to the actor's "purpose" and knowledge. The rejected jury instructions make no reference to the officer's intent. The instructions define "deadly force" as force which objectively creates a "substantial risk of causing death or serious bodily injury."

The basis of petitioner's claim here, and the proof introduced by petitioner at trial, is that the use of police dogs to bite suspects regularly results in serious injuries of a kind that must be analyzed under the more restrictive Fourth Amendment standard in *Tennessee v. Garner*.

The likelihood of such injury in the context of the use of police dogs trained to "bite hard," as was the case in Escondido, is so great and the potential injuries so grave that the principles in *Tennessee v. Garner* should be applied to limit the use of such dogs to situations in which "deadly force" is appropriate. This Court should take this opportunity to revisit *Tennessee v. Garner* in a non-shooting context, so that the constitutional principles applicable in these circumstances are clear and uniform throughout the Nation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul L. Hoffman*
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Santa Monica, CA 90401

Counsel for Petitioner
Robert L. Vera Cruz

*Counsel of Record

APPENDIX A

APPENDIX A

Robert L. VERA CRUZ, Plaintiff-Appellant,

v.

CITY OF ESCONDIDO; Vincent Jimno, Chief; James Malandra; Robert Benton; Stephen Skuba; Eric Distel; Corey Moles, Sgt.; Does 1 through 200, inclusive, Defendants-Appellees.

No. 95-56782.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 11, 1996.

Decided Oct. 3, 1997.
As Amended on Denial of Rehearing and Rehearing En Banc March 31, 1998.

Individual who was injured by police dog brought civil rights action against police officer. The United States District Court for the Southern District of California, Napoleon A. Jones, J., entered judgment in favor of officer, and appeal was taken. The Court of Appeals, Kozinski, Circuit Judge, held that: (1) "deadly force," for purpose of Fourth Amendment restrictions on police conduct, means force reasonably likely to kill, and (2) police officer did not use deadly force in violation of the Fourth Amendment when he used police dog to apprehend a fleeing suspect.

Affirmed.

Hawkins, Circuit Judge, concurred in judgment.

Opinion, 126 F.3d 1214, superseded.

[1] ARREST k68(2)
35k68(2)
"Deadly force," for purpose of Fourth Amendment restrictions on police conduct, means force reasonably likely to kill. U.S.C.A. Const.Amend. 4.
See publication Words and Phrases for other judicial constructions and definitions.

[2] ARREST k68(2)
35k68(2)
Model Penal Code's definition of deadly force did not apply in determining whether police officer used deadly force in violation of Fourth Amendment when he apprehended fleeing suspect with police dog. U.S.C.A. Const.Amend. 4.

[3] ARREST k68(2)
35k68(2)
Police officer did not use deadly force in violation of Fourth Amendment when he used police dog to apprehend fleeing suspect, even assuming that properly trained police dog could kill a suspect under highly unusual circumstances; prospect of such aberration did not convert otherwise nondeadly force into deadly force. U.S.C.A. Const.Amend. 4.

*660 Donald W. Cook, Los Angeles, California, for plaintiff-appellant Robert L. Vera Cruz.

Jeffrey R. Epp, David R. Chapman, City Attorneys, Mark A. Waggoner, Assistant City Attorney, Office of the City Attorney, Escondido, California, for defendants-appellees City of Escondido, Sgt. Corey Moles, Chief Vincent Jimno, James Malandra # 243, Robert Benton # 152, Stephen Skuba # 224 and Eric Distel # 196.

Robert S. Wolfe, Eugene P. Ramirez, Steven J. Renick, Manning, Marder and Wolfe, for defendants-appellees City

of Escondido, Vincent Jimno, Corey Moles, and David Reaver and Adlerhorst International, Inc.

Appeal from the United States District Court for the Southern District of California; Napoleon A. Jones, District Judge, Presiding. D.C. No. CV-92- 01970-NAJ.

Before HALL, KOZINSKI and HAWKINS, Circuit Judges.

KOZINSKI, Circuit Judge.

[1] We hold that deadly force under *Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)*, means force reasonably likely to kill.

I.

1992 did not start well for Robert Vera Cruz. After drinking more than two six-packs of beer on New Year's Day, he headed over to the local Del Taco restaurant. The Del Taco employees were cleaning up after closing and refused to serve Vera Cruz, who then challenged them to a fight. When the challenge was declined, Vera Cruz angrily hit the restaurant window and went home.

Just after returning home, Vera Cruz's thirst also returned and so he set out for the liquor store, which happened to be next door to the Del Taco. Before leaving, Vera Cruz strapped a knife to his hip-to protect himself from the Del Taco employees, he explained.

Responding to a call from the said employees, Escondido Police Officer Eric Distel and his K-9 companion were the first to arrive at the scene. Distel spotted Vera Cruz in a doorway at the rear of the Del Taco throwing objects out of the building. When the officer identified himself, Vera Cruz began walking away. Distel

then warned Vera Cruz to stop or he would release the dog; Vera Cruz started running. After giving another warning, Distel released the dog, who bit Vera Cruz on the right arm, bringing him to the ground. After disarming Vera Cruz, Distel ordered the dog to release his bite, and the dog immediately complied. Vera Cruz sustained a large laceration and several puncture *661 wounds on his upper right arm; he required surgery and eight days of hospitalization.

Vera Cruz sued the City of Escondido, its chief of police and several police officers, including Distel, under 42 U.S.C. § 1983, claiming he was the subject of an unreasonable seizure in violation of the Fourth Amendment. The jury found by way of a special verdict that the officer had not used excessive force. Vera Cruz moved for a new trial, arguing that the district court erred in refusing to instruct the jury on the deadly force rule of Garner. The Court there announced that police may only use deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others[.]" *471 U.S. at 11, 105 S.Ct. at 1701.* The district court denied the motion, holding that "the evidence presented in this case would not permit a reasonable jury to find that the force applied against the plaintiff was deadly force." Appellant makes various claims; we consider here only the deadly force instruction.[1]

II.

While the Supreme Court in Garner established a special rule concerning deadly force, it did not explain what it

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[1] We address appellant's other claims in an unpublished disposition.

meant by that phrase.[2] In fact, what the phrase means is far from obvious. Given the frailty of the human body, and the wide variety of conditions under which the police must operate, almost any use of force is potentially deadly: A suspect may slip, fall and sustain a lethal head injury, even though the police used only moderate force; a small cut, if left untreated, might become infected and cause death. Yet we do not read Garner as covering all uses of force that might result in death, no matter how remote the possibility. The question is, how likely must death be in order to consider the force deadly?

Vera Cruz urges us to adopt the Model Penal Code's definition of deadly force. According to the MPC, deadly force means "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury." Model Penal Code § 3.11(2) (1962) (emphasis added). Vera Cruz argues that he was entitled to a deadly force instruction because he presented evidence that police dogs can cause serious bodily injury.

---

[2] This omission most likely is attributable to the fact there was no doubt in Garner that deadly force had been used because the police had shot and killed the fleeing suspect. Justice O'Connor in dissent expressed concern that the majority's sweeping language "unnecessarily implies that the Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk." Id. at 31, 105 S.Ct. at 1711 (O'Connor, J., dissenting). Justice O'Connor also noted that the "Court's opinion, despite its broad language, actually decides only that the shooting of a fleeing burglary suspect who was in fact neither armed nor dangerous can support a § 1983 action." *Id. at 31-32, 105 S.Ct. at 1711-12* (O'Connor, J., dissenting) (emphasis added).

Although we have mentioned the "significant risk of death or serious bodily injury" formulation in three other dogbite cases, we have done so only in dicta. In fact, two of the cases simply refer to the fact that one of our colleagues relied on the MPC in his lonely effort to define deadly force in *Chew v. Gates, 27 F.3d 1432, 1453 & n. 4 (9th Cir.1994) (Norris, J., concurring and dissenting). See Quintanilla v. City of Downey, 84 F.3d 353, 357 (9th Cir.1996)* ("Deadly force has been described as 'force that creates a substantial risk of causing death or serious bodily harm.' " (emphasis added)). The plaintiffs in those cases failed to present any proof that the dogs in question (or police dogs in general) were capable of causing more than "superficial bites" which did not "require serious medical attention." *Quintanilla, 84 F.3d at 358.* Thus, the earlier cases had no occasion to decide whether force likely to result in serious injury (but not death) amounted to deadly force.

Our case squarely presents this question. Vera Cruz himself required surgery and eight days of hospitalization. At trial, four witnesses testified that such injuries are not unusual; police dogs can--and often do--cause serious harm. One witness testified that he knew of cases where dogs had bitten *662 a person on the face, bitten part of a person's nose off, bitten people in the genitals, and bitten a woman's breasts. At the same time, Vera Cruz presented no evidence that dogbites are likely to result in death. See p. ---- and n. 3 infra. This case, thus, requires us to decide whether force capable of inflicting serious--but not fatal--injuries qualifies as lethal force under Garner.

[2] We now reject the MPC's definition as inapposite to the Fourth Amendment context. The MPC's definition and Garner 's deadly force rule serve entirely different purposes: The MPC is designed to govern criminal liability; Garner's

deadly force rule sets the boundaries of reasonable police conduct under the Fourth Amendment. We decline to put police doing their jobs in the same category as criminals doing theirs. Because criminal activities serve no legitimate purpose, there is no reason to spare criminals from even remote consequences of their actions; deterrence, by forcing criminals to assume responsibility for all the harm they cause by their anti- social conduct, is the very essence of criminal law. Law enforcement personnel, by contrast, serve important purposes; the risk of personal liability, if taken beyond its pr[illegible] scope, may make police timid and deter activities necessary for our protection. Criminals, moreover, can largely control the circumstances of their crimes and thus minimize the risk that force will be necessary; law enforcement personnel must take the situation as they find it.

The MPC's definition of deadly force is also at loggerheads with Fourth Amendment caselaw. A central consideration under the MPC's definition--the subjective intent of the actor--is an impermissible consideration in the Fourth Amendment context: While it makes perfect sense for criminal law purposes to consider whether "the actor uses [the force] with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury," the question in police brutality cases is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989)* (emphasis added). Moreover, the MPC's formulation, containing the disjunctive "or," would turn the deadly force rule into a "serious bodily injury" rule, rendering Garner 's distinction between ordinary force and deadly force a virtual nullity. This is plainly not what the Supreme Court had in mind in

Garner.

Other circuits do seem to have adopted the MPC's definitions of deadly force, though none of those cases presented a record like ours. Two of the circuits-- the Tenth in *Ryder v. City of Topeka, 814 F.2d 1412, 1416 n. 11 (10th Cir.1987)*, and the Eleventh in *Pruitt v. City of Montgomery, 771 F.2d 1475, 1479 n. 10 (11th Cir.1985)*--dropped footnotes approving the MPC's definition in dicta. It's not apparent why they did so, since both cases involved shootings, which are clearly deadly force after *Garner*. *See n. 2 supra.* And the Eighth Circuit in *Mattis v. Schnarr, 547 F.2d 1007, 1009 n. 2 (8th Cir.1976)* vacated as moot sub nom. *Ashcroft v. Mattis, 431 U.S. 171 (1977)*, a pre-Garner case, also included the obligatory MPC footnote, but the issue of what constitutes deadly force was not even posed there; the issue, rather, was whether deadly force could be used to stop a fleeing felon who himself had not used deadly force.

The most relevant out-of-circuit case is *Robinette v. Barnes, 854 F.2d 909 (6th Cir.1988)* where the suspect was actually killed by a freakish dog bite. The court there did rely extensively on the MPC's definition, but it focused on the "substantial risk of causing death" prong of the definition, concluding that deadly force was not used because there was no showing that the unusual circumstances which resulted in the suspect's death were foreseeable. *Id. at 912. Robinette* did not consider the "substantial risk of causing ... serious bodily injury" prong of the MPC's definition. Indeed, other language in Robinette suggests that the Sixth Circuit might follow our ruling if presented with an argument like that raised by Vera Cruz: "[T]he mere recognition that a law enforcement tool is dangerous does not suffice as proof that the tool is an instrument of deadly force." *Id. at 913.*

*663 In short, the out-of-circuit cases, like our own earlier cases, are not very helpful because they did not confront the question presented here. Those courts seem to have seized the MPC's definition for want of anything better, but did not consider--had no reason to consider--how it would apply on a record like ours.

As we read Garner, deadly force is that force which is reasonably likely to cause death. While there are few enough clues in Garner, our interpretation does find support in the Court's reasoning there. First, Garner noted that use of deadly force actually frustrates the interest of the criminal justice system because it's a "self-defeating way of apprehending a suspect.... If successful, it guarantees that [the criminal justice] mechanism will not be set in motion." *471 U.S. at 10, 105 S.Ct. at 1700.* Second, the Court concluded that any law enforcement benefits, such as discouraging escape attempts, don't outweigh a nonviolent suspect's fundamental interest in his own life. *Id. at 10-11, 105 S.Ct. at 1701.* Both of these considerations hinge on the assumption that the use of deadly force threatens a suspect's life. Were this assumption relaxed-say, by positing that deadly force need only cause serious bodily injury-these concerns would be implicated to a far lesser degree and the Court may well have struck the balance differently.

[3] Vera Cruz presented no evidence that properly trained police dogs are reasonably capable of causing death. *See Don Burton, Inc. v. Aetna Life & Cas. Co., 575 F.2d 702, 706 (9th Cir.1978)* ("[A] litigant is entitled to have the jury charged concerning his theory of the case if there is any direct or circumstantial evidence to support it."). In fact, Vera Cruz presented no evidence at trial that police

dogs can kill under any circumstances.[3]

Nevertheless, we will assume that a properly trained police dog could kill a suspect under highly unusual circumstances. The prospect of such an aberration doesn't convert otherwise nondeadly force into deadly force. Robinette--the only reported case where a police dog actually killed a suspect-illustrates our point. In Robinette, the suspect bled to death after a police dog bit him on the neck. Apparently, the dog was trained to bite whatever part of the anatomy was nearest if an arm was unavailable and the suspect had hidden under a car so that only his neck was exposed. *854 F.2d at 912.* The Robinette court held that the use of the dog did not amount to deadly force because the outcome was "an extreme aberration[.]" Id. In judging whether force is deadly, we do not consider the result in a particular case-be it that the suspect was killed or injured-but whether the force used had a reasonable probability of causing death. Were the rule otherwise, all uses of force would be subject to Garner 's deadly force requirements because almost any use of force could cause death under peculiar enough circumstances. To be entitled to a deadly force instruction, a plaintiff must present evidence that the force used, in the circumstances under

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[3] At oral argument before us, plaintiff's counsel stated:

Number one there was testimony as to a number of deaths from police dog attacks. It came from Mr. Bogardus and Dr. Meade. There haven't been many; two or three was their testimony. Secondly, we have the testimony of the capacity of the dog to cause death.

After searching the record, we can find no such reference either to a number of deaths caused by police dogs or to their capacity to kill. Mr. Bogardus did testify about two incidents in which police officers were allegedly killed by suspects after releasing their dogs. R.T. vol. 3, at 409, June 22, 1995.

which it was used, posed more than a remote possibility of death.[4] Because Vera Cruz presented no such evidence, the district court did not err in refusing to give a deadly force instruction.

AFFIRMED.

CONCURRING OPINION

*664 Hawkins, Circuit Judge, concurring:

I concur in the judgment.

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[4] Whether a particular use of force is reasonably likely to cause death is a function of two factors: (1) the degree of force and (2) the accuracy with which it is directed at a vulnerable part of the human anatomy. The greater the force, the less accurately it need be directed to cause death. Thus, a bullet has such killing capacity that it will be deemed lethal if deliberately discharged in the general direction of the victim. But a bullet shot in the air as a warning will not be deemed deadly even if it accidentally hits a tree branch which falls and kills the suspect below.

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT L. VERA CRUZ	)	**No. 95-56782**
	)	
Plaintiff-Appellant,	)	D.C.No.CV-92-01970-NAJ
	)	
v.	)	**ORDER AND**
CITY OF ESCONDIDO;	)	**AMENDED OPINION**
VINCENT JIMNO, Chief;	)	
JAMES MALANDRA #243;	)	
ROBERT BENTON #152;	)	
STEPHEN SKUBA #224;	)	
ERIC DISTEL #196;	)	
COREY MOLES, Sgt.;	)	
DOES 1 THROUGH 200,	)	
inclusive,	)	
	)	
Defendant-Appellees.	)	

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, District Judge, Presiding

Argued and Submitted
December 11, 1996 -- Pasadena, California

Filed October 3, 1997
Amended March 31, 1998

Before: Cynthia Holcomb Hall, Alex Kozinski and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Kozinski

ORDER

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The slip opinion filed October 3, 1997, is amended as follows:

page 12804, paragraph 4, line 1	Add "the" between "from" and "said".
page 12806, line 25:	Delete comma after (9th Cir. 1996).
page 12806, at end of line 31:	Insert:

The plaintiffs in those cases failed to present any proof that the dogs in question (or police dogs in general) were capable of causing more than "superficial bites" which did not "require serious medical attention." *Quintanilla*, 84 F.3d at 358. Thus, the earlier cases had no occasion to decide whether force likely to result in serious injury (but not death) amounted to deadly force.

Our case squarely presents this question. Vera Cruz himself required surgery and eight days of hospitalization. At trial, four witnesses testified that such injuries are not

unusual; police dogs can -- and often do -- cause serious harm. One witness testified that he knew of cases where dogs had bitten a person on the face, bitten part of a person's nose off, bitten people in the genitals, and bitten a woman's breasts. At the same time, Vera Cruz presented no evidence that dogbites are likely to result in death. *See* p. 2927 and n. 3 *infra.* This case, thus, requires us to decide whether force capable of inflicting serious -- but not fatal -- injuries qualifies as lethal force under *Garner.*

page 12806, line 32:	Change "MPC" to MPC's".
page 12806, line 33:	Change "MPC" to "MPC's".
page 12807, line 3:	Change "a" to "as".
page 12807, line 13:	Delete comma after "crimes" Delete "can" between "and" and "thus".
page 12807, line 28:	Change "MPC" to "MPC's".
page 12807, after line 33:	Insert as new paragraphs:

Other circuits do seem to have adopted the MPC's definition of deadly force, though none of those cases presented a record like ours. Two of the circuits -- the Tenth in *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987), and the Eleventh in *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985) -- dropped footnotes approving the MPC's definition in dicta.

It's not apparent why they did so, since both cases involved shootings, which are clearly deadly force after *Garner*. *See* n.2 *supra*. And the Eighth Circuit in *Mattis v. Schnarr*, 547 F.2d 1007, 1009 n.2 (8th Cir. 1976) vacated as moot sub nom. *Ashcroft v. Mattis*, 431 U.S. 171 (1977), a pre-*Garner* case, also included the obligatory MPC footnote, but the issue of what constitutes deadly force was not even posed there; the issue, rather, was whether deadly force could be used to stop a fleeing felon who himself had not used deadly force.

The most relevant out-of-circuit case is *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), where the suspect was actually killed by a freakish dog bite. The court there did rely extensively on the MPC's definition, but it focused on the "substantial risk of causing death" prong of the definition, concluding that deadly force was not used because there was no showing that the unusual circumstances which resulted in the suspect's death were foreseeable. *Id.* at 912. *Robinette* did not consider the "substantial risk of causing ... serious bodily injury" prong of the MPC's definition. Indeed, other language in *Robinette* suggests that the Sixth Circuit might follow our ruling if presented with an argument like that raised by Vera Cruz: "[T]he mere recognition that a law enforcement tool is dangerous does not suffice as proof that the tool is an instrument of deadly force." *Id.* at 913.

In short, the out-of-circuit cases, like our own earlier cases, are not very helpful because they did not confront the question presented here. Those courts seem to have seized the MPC's definition for want of anything better, but did not consider -- had no reason to consider -- how it would apply on a record like ours.

page 12809, lines 2 & 3:	Delete "v. Barnes, 854 F.2d 909 (6th Cir. 1988)".
page 12809, line 9:	Replace "Id. at 912." with 854 F.2d at 912".
page 12809, lines 11 & 12:	Delete "at 912."

HAWKINS, Circuit Judge, concurring:

I concur in the judgment.

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

Robert L. VERA CRUZ	)	**No. 95-56782.**
	)	
Plaintiff-Appellant,	)	D.C.No.CV-92-01970-NAJ
	)	
v.	)	
	)	**MEMORANDUM**
CITY OF ESCONDIDO;	)	
Vincent Jimno, Chief;	)	
James Malandra;	)	
Robert Benton; Stephen Skuba;	)	
Eric Distel; Corey Moles.;	)	
Does 1 through 200, inclusive	)	
	)	
Defendant-Appellees.	)	
	)	

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for the Southern District of California
Napoleon A. Jones, District Judge, Presiding.

Before: HALL, KOZINSKI and HAWKINS, Circuit Judges.
KOZINSKI, Circuit Judge.

Argued and Submitted Dec. 11, 1996.
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Individual who was injured by police dog brought civil rights action against police officer. The United States District Court for the Southern District of California, Napoleon A. Jones, J., entered judgment in favor of officer, and appeal was taken. The Court of Appeals, Kozinski, Circuit Judge, held that: (1) "deadly force," for purpose of

Fourth Amendment restrictions on police conduct, means force reasonably likely to kill, and (2) police officer did not use deadly force in violation of the Fourth Amendment when he used police dog to apprehend a fleeing suspect. Affirmed.

[1] We hold that deadly force under *Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)*, means force reasonably likely to kill.

I

1992 did not start well for Robert Vera Cruz. After drinking more than two six-packs of beer on New Year's Day, he headed over to the local Del Taco restaurant. The Del Taco employees were cleaning up after closing and refused to serve Vera Cruz, who then challenged them to a fight. When the challenge was declined, Vera Cruz angrily hit the restaurant window and went home.

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the ground. After disarming Vera Cruz, Distel ordered the dog to release his bite, and the dog immediately complied. Vera Cruz sustained a large laceration and several puncture wounds on his upper right arm; he required surgery and eight days of hospitalization.

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II

While the Supreme Court in Garner established a special rule concerning deadly force, *1216 it did not

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explain what it meant by that phrase.[2] In fact, what the phrase means is far from obvious. Given the frailty of the human body, and the wide variety of conditions under which the police must operate, almost any use of force is potentially deadly: A suspect may slip, fall and sustain a lethal head injury, even though the police used only moderate force; a small cut, if left untreated, might become infected and cause death. Yet we do not read Garner as covering all uses of force that might result in death, no matter how remote the possibility. The question is, how likely must death be in order to consider the force deadly?

Vera Cruz urges us to adopt the Model Penal Code's definition of deadly force. According to the MPC, deadly force means "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury." Model Penal Code § 3.11(2) (1962) (emphasis added). Vera Cruz argues that he was entitled to a deadly force instruction because he presented evidence that police dogs can cause serious bodily injury.

---

[2] This omission most likely is attributable to the fact there was no doubt in Garner that deadly force had been used because the police had shot and killed the fleeing suspect. Justice O'Connor in dissent expressed concern that the majority's sweeping language "unnecessarily implies that the Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk." *Id. at 31, 105 S.Ct. at 1711* (O'Connor, J., dissenting). Justice O'Connor also noted that the "Court's opinion, despite its broad language, actually decides only that the shooting of a fleeing burglary suspect who was in fact neither armed nor dangerous can support a § 1983 action." *Id. at 31-32, 105 S.Ct. at 1711-12* (O'Connor, J., dissenting) (emphasis added).

Although we have mentioned the "significant risk of death or serious bodily injury" formulation in three other dogbite cases, we have done so only in dicta. In fact, two of the cases simply refer to the fact that one of our colleagues relied on the MPC in his lonely effort to define deadly force in *Chew v. Gates, 27 F.3d 1432, 1453 & n. 4 (9th Cir.1994) (Norris, J., concurring and dissenting). See Quintanilla v. City of Downey, 84 F.3d 353, 357 (9th Cir.1996)*, ("Deadly force has been described as 'force that creates a substantial risk of causing death or serious bodily harm.' " (emphasis added)) cert. denied, --- *U.S. ----, 117 S.Ct. 972, 136 L.Ed.2d 856 (1997); Fikes v. Cleghorn, 47 F.3d 1011, 1014 (9th Cir.1995)* (deadly force "might be defined as " force that creates a substantial risk of causing death or serious bodily harm (emphasis added)).

[2] We now reject the MPC definition as inapposite to the Fourth Amendment context. The MPC definition and Garner 's deadly force rule serve entirely different purposes: The MPC is designed to govern criminal liability; Garner 's deadly force rule sets the boundaries of reasonable police conduct under the Fourth Amendment. We decline to put police doing their jobs in the same category as criminals doing theirs. Because criminal activities serve no legitimate purpose, there is no reason to spare criminals from even remote consequences of their actions; deterrence, by forcing criminals to assume responsibility for all the harm they cause by their anti-social conduct, is the very essence of criminal law. Law enforcement personnel, by contrast, serve important purposes; the risk of personal liability, if taken beyond its proper scope, may make police timid and deter activities necessary for our protection. Criminals, moreover, can largely control the circumstances of their crimes, and can thus minimize the risk that force will be necessary; law enforcement personnel must take the situation as they find it.

The MPC's definition of deadly force is also at loggerheads with Fourth Amendment caselaw. A central consideration under the MPC's definition-the subjective intent of the actor-is an impermissible consideration in the Fourth Amendment context: While it makes perfect sense for criminal law purposes to consider whether "the actor uses [the force] with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury," the question in police brutality cases is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989)* (emphasis added). Moreover, the MPC formulation, containing the disjunctive "or," would turn the deadly force *1217 rule into a "serious bodily injury" rule, rendering Garner 's distinction between ordinary force and deadly force a virtual nullity. This is plainly not what the Supreme Court had in mind in Garner.

As we read Garner, deadly force is that force which is reasonably likely to cause death. While there are few enough clues in Garner, our interpretation does find support in the Court's reasoning there. First, Garner noted that use of deadly force actually frustrates the interest of the criminal justice system because it's a "self-defeating way of apprehending a suspect.... If successful, it guarantees that [the criminal justice] mechanism will not be set in motion." *471 U.S. at 10, 105 S.Ct. at 1700.* Second, the Court concluded that any law enforcement benefits, such as discouraging escape attempts, don't outweigh a nonviolent suspect's fundamental interest in his own life. *Id. at 10-11, 105 S.Ct. at 1701.* Both of these considerations hinge on the assumption that the use of deadly force threatens a suspect's life. Were this assumption relaxed-say, by positing that deadly force need only cause serious bodily

injury-these concerns would be implicated to a far lesser degree and the Court may well have struck the balance differently.

—[3] Vera Cruz presented no evidence that properly trained police dogs are reasonably capable of causing death. *See Don Burton, Inc. v. Aetna Life & Cas. Co., 575 F.2d 702, 706 (9th Cir.1978)* ("[A] litigant is entitled to have the jury charged concerning his theory of the case if there is any direct or circumstantial evidence to support it."). In fact, Vera Cruz presented no evidence at trial that police dogs can kill under any circumstances.[3]

Nevertheless, we will assume that a properly trained police dog could kill a suspect under highly unusual circumstances. The prospect of such an aberration doesn't convert otherwise nondeadly force into deadly force. *Robinette v. Barnes, 854 F.2d 909 (6th Cir.1988)*-the only reported case where a police dog actually killed a suspect-illustrates our point. In Robinette, the suspect bled to death after a police dog bit him on the neck. Apparently, the dog was trained to bite whatever part of the anatomy was nearest if an arm was unavailable and the suspect had hidden under a car so that only his neck was

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[3] At oral argument before us, plaintiff's counsel stated: Number one there was testimony as to a number of deaths from police dog attacks. It came from Mr. Bogardus and Dr. Meade. There haven't been many; two or three was their testimony. Secondly, we have the testimony of the capacity of the dog to cause death.

After searching the record, we can find no such reference either to a number of deaths caused by police dogs or to their capacity to kill. Mr. Bogardus did testify about two incidents in which police officers were allegedly killed by suspects after releasing their dogs. R.T. vol. 3, at 409, June 22, 1995.

exposed. *Id. at 912.* The Robinette court held that the use of the dog did not amount to deadly force because the outcome was "an extreme aberration [.]" *Id. at 912.* In judging whether force is deadly, we do not consider the result in a particular case-be it that the suspect was killed or injured- but whether the force used had a reasonable probability of causing death. Were the rule otherwise, all uses of force would be subject to Garner 's deadly force requirements because almost any use of force could cause death under peculiar enough circumstances. To be entitled to a deadly force instruction, a plaintiff must present evidence that the force used, in the circumstances under which it was used, posed more than a remote possibility of death.[4] Because Vera Cruz presented no such evidence, the district court did not err in refusing to give a deadly force instruction.

AFFIRMED.

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[4] Whether a particular use of force is reasonably likely to cause death is a function of two factors: (1) the degree of force and (2) the accuracy with which it is directed at a vulnerable part of the human anatomy. The greater the force, the less accurately it need be directed to cause death. Thus, a bullet has such killing capacity that it will be deemed lethal if deliberately discharged in the general direction of the victim. But a bullet shot in the air as a warning will not be deemed deadly even if it accidentally hits a tree branch which falls and kills the suspect below.

APPENDIX D

APPENDIX D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Robert L. VERA CRUZ	)	**NO. 921970J (POR)**
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	**JUDGMENT ON**
	)	**SPECIAL VERDICT**
CITY OF ESCONDIDO;	)	
Vincent Jimno, Chief;	)	
James Malandra;	)	
Robert Benton; Stephen Skuba;	)	
Eric Distel; Corey Moles.;	)	
Does 1 through 200, inclusive	)	
	)	
Defendant-Appellees.	)	
	)	

This matter came on regularly for trial on June 20, 1995, before the Honorable Napoleon Jones, in Courtroom 12 of the United States District Court located at 940 Front Street, San Diego, California. Plaintiff was represented by Attorney Robert Mann, and the Defendants City of Escondido, Vincent Jimno, Eric Distel, Jeff Galindo, Steve Skuba, Robert Benton and Corey Moles were represented by Attorney Mark A. Waggoner.

The jury having been regularly empaneled, heard the evidence, and having been presented with the following special verdict, gave the following responses thereto:

Question No. 1: Do you find that Officer Distel used

excessive force in the apprehension or arrest of Plaintiff?

Answer "yes" or no".

Answer: No.

If you answer Question No. 1 "yes", then proceed to Question No. 2. If you answer Question No. 1 "no" then sign and date this form and return it to the Court.

All individual Defendants having been dismissed before the verdict and the jury having found in favor of the Defendant CITY OF ESCONDIDO.

IT IS THEREFORE ORDERED that judgment be entered in favor of the CITY OF ESCONDIDO and ERIC DISTEL and against the Plaintiff.

IT IS SO ORDERED:

Date: August 2, 1995

/s/ Napoleon Jones
NAPOLEON JONES
District Court Judge